

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MILAUDI KARBOAU,

Plaintiff,

v.

No. C12-5045 BHS/KLS

**SECOND ORDER TO SHOW CAUSE**

LOWELL CLARK, MACHOTTEN,  
GEORGE WIGGEN, JANSSEN SADLER,  
LEE JARAMELIO, DALE SHELLY,  
PORTER, JOSE MONCIVAISE, ERIC  
SMITH, SNYDER, HAUBIEL, OSMAN  
KOUNTA, MACRATHER, DE GRAAFT,  
MCCURDY, PAT LOVE, ALICIA  
SINGLETON, S. STEVENSON, U.S.  
DEPARTMENT OF HOMELAND  
SECURITY, IMMIGRATION AND  
CUSTOMS ENFORCEMENT, ERIC H.  
HOLDER, JANET NAPOLITANO, NEAL  
KLARK, JAMES BOENING, SAN  
MEGUEL, MASON, DE LA PAZ, and  
FUENTES,

Defendants.

Before the Court is Plaintiff's Amended Complaint. ECF No. 16. Plaintiff is a detainee at the Northwest Detention Center (NWDC), a federal immigration detention facility administered under contract by The GEO Group, Inc.<sup>1</sup> Plaintiff presented to this Court for filing a civil rights complaint under 42 U.S.C § 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Plaintiff purports to sue several GEO employees in their personal and official capacities; several fellow NWDC detainees, the United States Department of

<sup>1</sup> See <http://www.thegeogroupinc.com/northamerica.asp?fid=105>; <http://www.ice.gov/pi/dro/facilities/tacoma.htm>.

1 Homeland Security (Homeland Security), the Immigration and Custom Enforcement (ICE), and  
2 several ICE employees in their personal and official capacities.

3 By Order dated February 17, 2012, Plaintiff was ordered to show cause why this matter  
4 should not be dismissed or, alternatively to file an amended complaint curing the deficiencies  
5 outlined in the Court's order. ECF No. 10. Plaintiff was given a deadline to amend or show  
6 cause by March 23, 2012. *Id.* On March 22, 2012, Plaintiff filed a motion for extension of time  
7 requesting a 60 day extension. ECF No. 12. He stated he needed additional time as he is also  
8 working on pending immigration deportation proceedings and is awaiting legal materials  
9 pertinent to his case from the American Bar Association. *Id.* The Court granted him an  
10 extension until May 22, 2012. ECF No. 13.

12 On May 22, 2012, Plaintiff requested another 90 day extension of time to respond to the  
13 Court's Order. ECF No. 14. Plaintiff states that he is no longer in custody, is physically  
14 disabled, is homeless, and was without his documents for two weeks. ECF No. 14. The Court  
15 granted Plaintiff another extension, until July 6, 2012, to show cause or to file an amended  
16 complaint in this matter. ECF No. 15.

18 On July 14, 2012, after the deadline had passed, Plaintiff filed an Amended Complaint.  
19 ECF No. 16. The Amended Complaint is also deficient. The Court will give Plaintiff one more  
20 opportunity to amend. He will be given no extensions of time to do so. If he fails to cure the  
21 deficiencies noted herein or fails to submit an amended complaint within the deadline, the Court  
22 will recommend that all or portions of his Amended Complaint be dismissed for failure to state a  
23 claim upon which relief may be granted.

## 25 DISCUSSION

26 The Court "may act on its own initiative to note the inadequacy of a complaint and

dismiss it for failure to state a claim” upon which relief may be granted. *Wong v. Bell*, 642 F.2d 359, 361 (9th Cir. 1981) (*citing* 5 C.WRIGHT & A.MILLER, FEDERAL PRACTICE AND PROCEDURE, s 1357 at 593 (1969)); *see also Sparling v. Hoffman Construction Co. Inc.*, 864 F.2d 635, 638 (9th Cir. 1988); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (court may *sua sponte* invoke Fed. R. Civ. P. 12(b)(6) to dismiss deficient complaint); *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979). The Court must give a plaintiff both “notice of its intention to dismiss” and “some opportunity to respond,” however, unless plaintiff “cannot possibly win relief.” *Sparling*, 864 F.2d at 638 (quoting *Wong*, 642 F.2d at 362)). Accordingly, while the Court finds that dismissal of Plaintiff’s complaint under Fed. R. Civ. P. 12(b)(6) is proper for the reasons set forth below, the Court is issuing this order to show cause in order to give him an opportunity to file a response.

A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.” See *Bell Atlantic, Corp. v. Twombly*, 540 U.S. 544, 127 S.Ct. 1955, 1965 (2007) (citations omitted). In other words, failure to present enough facts to state a claim for relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

To state a claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and its progeny, Plaintiff must allege that (1) a right secured by the

1 Constitution of the United States was violated and (2) the alleged violation was committed by a  
2 federal actor. See *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir.1991). 42 U.S.C. § 1983 and  
3 *Bivens* actions are identical save for the replacement of a state actor under § 1983 with federal  
4 actor under *Bivens*). A *Bivens* claim is not available against a federal agency. *FDIC v. Meyer*,  
5 510 U.S. 471, 486, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994).

6  
7 **A. Parties**

8 To state a claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct.  
9 1999, 29 L.Ed.2d 619 (1971), and its progeny, Plaintiff must allege that (1) a right secured by the  
10 Constitution of the United States was violated and (2) the alleged violation was committed by a  
11 federal actor. See *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir.1991). 42 U.S.C. § 1983 and  
12 *Bivens* actions are identical save for the replacement of a state actor under § 1983 with federal  
13 actor under *Bivens*).

14  
15 **(1) Homeland Security and ICE**

16 Plaintiff names Homeland Security and ICE as Defendants. He was previously advised  
17 that a *Bivens* claim is not available against a federal agency. *FDIC v. Meyer*, 510 U.S. 471, 486,  
18 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Despite this, Plaintiff again named these federal  
19 agencies in his Amended Complaint and provides no basis, in law or in fact, for their inclusion.  
20 Plaintiff must explain why he should be allowed to proceed against Homeland Security and ICE  
21 in this lawsuit despite federal law to the contrary.

22  
23 **(2) GEO and ICE Employees**

24 At page 24 of his Amended Complaint, lists numerous past and present employees of  
25 GEO and ICE (Eric Holder, Janet Napolitano, Neal Klark, Nathalie Asher, James  
26 Boening, San Meguel, Eric Lawton, Doe Mason, and De La Paz), whom he purports to sue in

1 their personal capacities. ECF No. 16, at 1, 24. He alleges generally that he informed these  
2 individuals that he was verbally attacked by a fellow inmate, and that they did nothing. Plaintiff  
3 was previously advised that he must state what action each of these individuals took or did not  
4 take to violate his constitutional rights, and when this action occurred. He has failed to amend  
5 his complaint to include any factually specific allegations.

6  
7 **(3) Claims Against Fellow Detainees**

8 Plaintiff purports to sue fellow detainees Osman Kounta and Doe Fuentes, in their  
9 personal and official capacities. As noted above, *Bivens* claims are against *federal* actors –  
10 Plaintiff was previously advised that he may not pursue a *Bivens* or § 1983 claim against a  
11 private citizen in this Court. However, he has again included claims against Osman Kounta and  
12 Doe Fuentes. Plaintiff provides no basis in law or in fact for including these claims. Plaintiff  
13 must explain why he should be allowed to proceed against a fellow detainee in this lawsuit  
14 despite federal law to the contrary.

15  
16 **B. Claim Eight - Excessive Force Against Macarther**

17 Plaintiff claims that on June 1, 2011, Officer Macarther used excessive force when he  
18 grabbed Plaintiff's wrist, twisted it behind Plaintiff's back and handcuffed Plaintiff. ECF No.  
19 16, at 16-17. Plaintiff was previously advised that where a federal prisoner seeks damages from  
20 privately employed personnel (GEO employees), working at a privately operated federal prison  
21 (the NWDC), where the conduct allegedly amounts to a violation of the Eighth Amendment, and  
22 where that conduct is of a kind that typically falls within the scope of traditional state tort law  
23 (such as the conduct involving excessive force issue here), the prisoner must seek a remedy  
24 under state tort law. A *Bivens* remedy will not be implied in such a case. *See, Minneci v. Pollard*,  
25 --- U.S. ---, 132 S.Ct. 617 (2012).

1 Even though Plaintiff was advised that he must seek a remedy under state tort law, he  
2 again seeks to plead a claim of excessive force against Officer Maccarther. Plaintiff must  
3 explain to this Court why he should be allowed to proceed on such a claim despite federal law to  
4 the contrary.

5 **C. Claim Nine -- Defendants Marrero and Portero**

6 Plaintiff alleges that while he was in segregation, Officer Marrero read his legal papers  
7 while labeling and inventorying them. Plaintiff also alleges that Officer Marrero scattered his  
8 legal papers into several piles and refused to give them to Plaintiff. Plaintiff also alleges that  
9 Defendant Portero instructed all segregation officers that Plaintiff was not to be given his legal  
10 paperwork in his cell. Plaintiff received his documents ten days later when he left segregation.  
11 ECF No. 16, p. 17.

12 To state a claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct.  
13 1999, 29 L.Ed.2d 619 (1971), and its progeny, Plaintiff must allege that (1) a right secured by the  
14 Constitution of the United States was violated and (2) the alleged violation was committed by a  
15 federal actor. See *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir.1991). Plaintiff was  
16 previously advised that with regard to this claim, he has failed to allege how this conducted  
17 violated his constitutional rights. In his Amended Complaint, he still fails to allege any violation  
18 of a right secured by the Constitution. He must do so, or this claim will be dismissed.

19 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff  
20 must show cause explaining why this matter should not be dismissed or, alternatively, he may  
21 file an amended complaint curing, if possible, the above noted deficiencies. Plaintiff must show  
22 cause or file the amended complaint **no later than August 31, 2012**. If Plaintiff files an  
23 amended complaint under *Bivens*, the amended complaint shall consist of a **short and plain**  
24  
25  
26

1 **statement** showing that he is entitled to relief. Plaintiff shall allege with specificity the  
2 following:

- 3 (1) the names of the persons who caused or personally participated in causing the  
4 alleged deprivation of his constitutional rights;  
5 (2) the dates on which the conduct of each Defendant allegedly took place; and  
6 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

7 Plaintiff shall set forth his factual allegations in separately numbered paragraphs and shall  
8 attach only those exhibits relevant to the factual allegations contained within the amended  
9 complaint.  
10

11 Plaintiff is further advised that this amended pleading will operate as a complete  
12 substitute for (rather than a mere supplement to) the present complaint. Plaintiff shall present his  
13 complaint on the form provided by the Court. The amended complaint must be legibly rewritten  
14 or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part  
15 of the original complaint by reference, and **it must be clearly labeled the “Amended**  
16 **Complaint” and contain the same case number as this one.**

17 The Clerk is directed to send Plaintiff the appropriate forms that he may file an amended  
18 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General  
19 Order to Plaintiff.  
20

21  
22 **DATED** this 31st day of July, 2012.

23  
24   
25 Karen L. Strombom  
26 United States Magistrate Judge